

Merit Systems Protection Board

§ 1201.203

(b) *Awards of consequential damages.* The Board may order payment of consequential damages, including medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages:

(1) As authorized by 5 U.S.C. 1221(g)(1)(A)(ii), where the Board orders corrective action in a whistleblower appeal to which 5 U.S.C. 1221 applies; and

(2) As authorized by 5 U.S.C. 1214(g)(2), where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. 1214.

(c) *Awards of compensatory damages.* The Board may order payment of compensatory damages, as authorized by section 102 of the Civil Rights Act of 1991 (42 U.S.C. 1981a), based on a finding of unlawful intentional discrimination but not on an employment practice that is unlawful because of its disparate impact under the Civil Rights Act of 1964, the Rehabilitation Act of 1973, or the Americans with Disabilities Act of 1990. Compensatory damages include pecuniary losses, future pecuniary losses, and nonpecuniary losses such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.

(d) *Definitions.* For purposes of this subpart:

(1) A *proceeding on the merits* is a proceeding to decide an appeal of an agency action under 5 U.S.C. 1221 or 7701, an appeal under 38 U.S.C. 4324, an appeal under 5 U.S.C. 3330a, a request to review an arbitration decision under 5 U.S.C. 7121(d), a Special Counsel complaint under 5 U.S.C. 1214 or 1215, or an agency action against an administrative law judge under 5 U.S.C. 7521.

(2) An *addendum proceeding* is a proceeding conducted after issuance of a final decision in a proceeding on the merits, including a decision accepting the parties' settlement of the case. The final decision in the proceeding on the merits may be an initial decision of a judge that has become final under § 1201.113 of this part or a final decision of the Board.

[63 FR 41179, Aug. 3, 1998, as amended at 65 FR 5409, Feb. 4, 2000]

§ 1201.203 Proceedings for attorney fees.

(a) *Form and content of request.* A request for attorney fees must be made by motion, must state why the appellant or respondent believes he or she is entitled to an award under the applicable statutory standard, and must be supported by evidence substantiating the amount of the request. Evidence supporting a motion for attorney fees must include at a minimum:

(1) Accurate and current time records;

(2) A copy of the terms of the fee agreement (if any);

(3) A statement of the attorney's customary billing rate for similar work, with evidence that that rate is consistent with the prevailing community rate for similar services in the community in which the attorney ordinarily practices; and

(4) An established attorney-client relationship.

(b) *Addendum proceeding.* A request for attorney fees will be decided in an addendum proceeding.

(c) *Place of filing.* Where the initial decision in the proceeding on the merits was issued by a judge in a MSPB regional or field office, a motion for attorney fees must be filed with the regional or field office that issued the initial decision. Where the decision in the proceeding on the merits was an initial decision issued by a judge at the Board's headquarters or where the only decision was a final decision issued by the Board, a motion for attorney fees must be filed with the Clerk of the Board.

(d) *Time of filing.* A motion for attorney fees must be filed as soon as possible after a final decision of the Board but no later than 60 days after the date on which a decision becomes final.

(e) *Service.* A copy of a motion for attorney fees must be served on the other parties or their representatives at the time of filing. A party may file a pleading responding to the motion within the time limit established by the judge.

(f) *Hearing; applicability of subpart B.* The judge may hold a hearing on a motion for attorney fees and may apply appropriate provisions of subpart B of this part to the addendum proceeding.

(g) *Initial decision; review by the Board.* The judge will issue an initial decision in the addendum proceeding, which shall be subject to the provisions for a petition for review by the Board under subpart C of this part.

[63 FR 41179, Aug. 3, 1998, as amended at 65 FR 24381, Apr. 26, 2000]

§ 1201.204 Proceedings for consequential damages and compensatory damages.

(a) *Time for making request.* (1) A request for consequential damages or compensatory damages must be made during the proceeding on the merits, no later than the end of the conference(s) held to define the issues in the case.

(2) The judge or the Board, as applicable, may waive the time limit for making a request for consequential damages or compensatory damages for good cause shown. The time limit will not be waived if a party shows that such waiver would result in undue prejudice.

(b) *Form and content of request.* A request for consequential damages or compensatory damages must be made in writing and must state the amount of damages sought and the reasons why the appellant or respondent believes he or she is entitled to an award under the applicable statutory standard.

(c) *Service.* A copy of a request for consequential damages or compensatory damages must be served on the other parties or their representatives when the request is made.

A party may file a pleading responding to the request within the time limit established by the judge or the Board, as applicable.

(d) *Addendum proceeding.* (1) A request for consequential damages or compensatory damages will be decided in an addendum proceeding.

(2) A judge may waive the requirement of paragraph (d)(1), either on his or her own motion or on the motion of a party, and consider a request for damages in a proceeding on the merits where the judge determines that such action is in the interest of the parties and will promote efficiency and economy in adjudication.

(e) *Initiation of addendum proceeding.* (1) A motion for initiation of an addendum proceeding to decide a request for

consequential damages or compensatory damages must be filed as soon as possible after a final decision of the Board but no later than 60 days after the date on which a decision becomes final. Where the initial decision in the proceeding on the merits was issued by a judge in a MSPB regional or field office, the motion must be filed with the regional or field office that issued the initial decision. Where the decision in the proceeding on the merits was an initial decision issued by a judge at the Board's headquarters or where the only decision was a final decision issued by the Board, the motion must be filed with the Clerk of the Board.

(2) A copy of a motion for initiation of an addendum proceeding to decide a request for consequential damages or compensatory damages must be served on the other parties or their representatives at the time of filing. A party may file a pleading responding to the motion within the time limit established by the judge.

(f) *Hearing; applicability of subpart B.* The judge may hold a hearing on a request for consequential damages or compensatory damages and may apply appropriate provisions of subpart B of this part to the addendum proceeding.

(g) *Initial decision; review by the Board.* The judge will issue an initial decision in the addendum proceeding, which shall be subject to the provisions for a petition for review by the Board under subpart C of this part.

(h) *Request for damages first made in proceeding before the Board.* Where a request for consequential damages or compensatory damages is first made on petition for review of a judge's initial decision on the merits and the Board waives the time limit for making the request in accordance with paragraph (a)(2) of this section, or where the request is made in a case where the only MSPB proceeding is before the 3-member Board, including, for compensatory damages only, a request to review an arbitration decision under 5 U.S.C. 7121(d), the Board may:

(1) Consider both the merits and the request for damages and issue a final decision;